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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH WARE,

Defendant and Appellant.

B167166

(Los Angeles County
Super. Ct. No. BA220696)

APPEAL from a judgment of the Superior Court of Los Angeles County,
George G. Lomeli, Judge. Affirmed.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Ware appeals from the judgment entered following his conviction by a jury for two counts of attempted murder of a peace officer, two counts of assault with a semiautomatic firearm upon a peace officer and one count of possession of a firearm by a felon. Ware contends substantial evidence does not support his convictions, the trial court improperly admitted evidence relating to outstanding warrants for parole and probation violations, his defense counsel was ineffective and the trial court committed sentencing error. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Charges

Ware was charged by amended information with the willful, deliberate and premeditated attempted murders of peace officers Joseph Kuns and James Carroll (Pen. Code, §§ 187, subd. (a), 664, subds. (e) & (f))¹; assault with a firearm upon peace officer Thomas Davoren (§ 245, subd. (d)(1)); and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The amended information specially alleged Ware had personally used and personally and intentionally discharged a firearm in committing the attempted murder offenses (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b) & (c)) and personally used a firearm in committing the assault offense (§§ 12022.5, subds. (a)(1) & (d), 12022.53, subd. (b)). The amended information also specially alleged Ware had a prior serious or violent felony conviction for manslaughter that constituted a “strike” under the “Three Strikes” law (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d)). After the initial trial the jury found Ware guilty of possession of a firearm by a felon and not guilty of assault. The jury, however, could not reach a verdict on the two attempted murder counts; and a mistrial was declared as to those counts.

The People filed a second amended information, recharging Ware with the willful, deliberate and premeditated attempted murders of peace officers Kuns and Carroll and also charging him with two counts of assault with a semiautomatic firearm on peace officers Kuns and Carroll (§ 245, subd. (d)(2)). The second amended information

¹ Statutory references are to the Penal Code unless otherwise indicated.

specially alleged as to all counts that Ware had personally used and personally and intentionally discharged a firearm in committing the offenses (§§ 12022.53, subds. (b) & (c)) and that Ware's prior manslaughter conviction constituted a "strike."

2. Summary of the People's Evidence

On August 4, 2001 16-year-old Tyrone Patterson attended a barbecue in the back parking lot of the apartment complex at 6811 South 10th Avenue in Los Angeles (the apartment complex) where his grandmother resided. At one point the person grilling the food asked Patterson to go to the store to buy more paper plates for the party. Another guest at the barbecue, whom Patterson knew as "Joseph" or "Gill-bone" and identified at trial as Ware, drove Patterson in a gray car to purchase the plates.² Patterson had seen Ware sitting in the gray car during the barbecue. At trial the gray car was identified as a 1985 Oldsmobile Cutlass.

Ware drove on Crenshaw Boulevard toward the store. At the same time, approximately 9:00 p.m., Officers Kuns and Carroll were patrolling Crenshaw Boulevard in a marked police car when they noticed the Oldsmobile being driven without its headlights on. Officer Kuns, the driver of the patrol car, positioned the car behind the Oldsmobile, activated its lights and then chirped its siren to alert the driver of the Oldsmobile to pull over. Ware pulled a gun from underneath the driver's seat of the car and turned into a gas station, traveling slowly as if to stop. After entering the gas station, Ware told Patterson to take the gun, leave the car and run. When Patterson refused to do so, Ware accelerated the car and returned to Crenshaw Boulevard.

The officers pursued as Ware wove through traffic, drove on the wrong side of the road and sideswiped a vehicle at a stop sign. Ware traveled into a residential area, circled around a block and then stopped. Ware, who the officers said was wearing a white T-shirt, got out of the car and, from a distance of 40 to 50 feet away, fired his gun at the officers; one of Ware's shots hit the hood of the police car. The officers returned fire. Ware reentered the Oldsmobile and sped away. Shortly thereafter, Ware crashed the

² Ware's mother and sister resided in the apartment complex.

Oldsmobile into a parked car near the apartment complex. He left his car carrying the gun and turned toward the officers, who again fired at him. Ware jumped the gate at the apartment complex.

Officer Carroll later identified Ware's picture in a photographic lineup as the one "most like" the person who shot at him and Officer Kuns; at trial Officer Carroll identified Ware as the shooter. The parties stipulated that Ware's left palm print was found on the inside of the window on the passenger side of the Oldsmobile.

The officers pulled Patterson out of the car, as he screamed, "I am a juvenile. Don't shoot me." Patterson told the officers the driver had been "Joseph" or "Gill-bone," had his hair braided and a tattoo of the letter "R" on his arm and wore a white T-shirt and Nike tennis shoes with red trim. At trial the parties stipulated that Ware had an "R" tattooed on his left arm.

Police backup called to the scene set up a perimeter around the apartment complex and began a search. Ware was found in one of the units with several of the children who lived in the building. One of the children, Dyneshia Smith, said Ware had entered the unit shortly after she had heard screeching tires and gunshots outside the apartment complex. When she first saw him, Ware was taking the braids out of his hair and asked her to help him and then to comb his hair out, which she did. Smith said she and other people in the unit, including Ware, had repeatedly looked out the window before the officers arrived. After pretending to be asleep, Ware told the officers his name was "Joseph King." Ware was arrested.

After the incident Patterson saw Ware's fiancée, Pamela King,³ at his aunt's apartment and overheard King telling his aunt that Patterson should not testify against Ware. King also came to Patterson's house. On one occasion Patterson saw King on the street; and she suggested he should not testify.

The police interviewed Anita Gay, another resident of the apartment complex. Gay explained that several days before August 4, 2001 she had sold the Oldsmobile to

³ At the time of trial King and Ware were married.

King for \$500. She believed the car was being purchased through King for “Gill-bone.” When “Gill-bone” gave Gay a \$100 deposit on August 1, 2001, she gave him the car key but kept the club key that locked the steering wheel. On August 3, 2001, after King paid her the remaining \$400, Gay turned over the club key. The following evening, August 4, 2001, Gay was pumping gas at a station on Crenshaw Boulevard when she thought she saw the Oldsmobile pass through the station followed by the police. She recognized Patterson as the passenger in the car but did not see the driver. Gay identified Ware in a photographic lineup and at Ware’s first trial as “Gill-bone,” to whom she had sold the car.⁴

The parties stipulated Ware (1) had been convicted of manslaughter in New Orleans, had absconded parole supervision and on August 4, 2001 was wanted by the authorities in Louisiana for violating his parole; and (2) had been convicted of possession of marijuana for sale in Los Angeles, had absconded from felony probation supervision and on August 4, 2001 a warrant for his arrest was outstanding.

3. Summary of the Defense’s Evidence

On August 4, 2001 Eddie Hogans, who lived in the apartment complex, hosted a barbecue in the parking lot behind the building. He bought the supplies and did all of the cooking for the barbecue. At no point during the barbecue, which lasted from the afternoon well into the evening, did he ask anyone to go to the store to buy additional paper plates for the party.

King testified that several days before the barbecue she had purchased the Oldsmobile from Gay. King did not intend for Ware to drive the car because he did not have a driver’s license. King had learned Gay was selling her car from Tyrone Reilly, Hogans’s stepson, who also resided in the apartment complex.⁵ King obtained the car

⁴ Gay was found by the trial court to be unavailable as a witness at the second trial. Her statement to the police and her testimony from Ware’s first trial were read to the jury.

⁵ Reilly was shot and killed about a week after the barbecue.

keys from Reilly and observed that he was carrying a silver gun at the time.⁶ Although King had possession of the car on the day of the barbecue, she had not driven it because she had not yet registered the car in her name. King also had not given the car keys to anyone, including Ware, although earlier in the day on August 4, 2001 Reilly had asked to borrow her new car.

Both King and Ware attended the barbecue on August 4, 2001. Ware wore a shirt (not a T-shirt), dark jeans and black boots. Ware did not own Nike tennis shoes with red trim. King observed Patterson smoking marijuana and drinking alcohol at the barbecue. During the barbecue, King developed a craving for fish and decided to drive her new car to the fish market. Before leaving, she found Ware in an upstairs apartment playing video games with some of the children who lived in the apartment complex and told him she was going to the fish market. When she went to her car, Patterson and Reilly were in the car and two other men were standing outside the car. King put her keys in the ignition but then saw one of her friends drive into the parking lot. Because King's friend offered to drive her to the fish market, King did not take her new car. Upon leaving the fish market, King realized she had left her keys in the ignition of the car. When she returned to the apartment complex after being gone about 20 minutes, the police had blocked off the streets and would not permit her to return to the building.

King visited Patterson's aunt at the apartment complex after the day of the barbecue but never directed her to tell Patterson not to testify or otherwise tried to intimidate Patterson.

4. The Jury's Verdict and Sentencing

The jury found Ware guilty of two counts of attempted murder of and two counts of assault with a semiautomatic firearm on peace officers Kuns and Carroll. The jury

⁶ King testified Antoine Powell, whom she sometimes referred to as "Tyrone," had been at the apartment complex about a week before the barbecue carrying a gun. The parties stipulated at trial that Powell's fingerprints did not match any of the prints lifted from the Oldsmobile.

found true the special firearm allegations but found not true the special allegation that the attempted murders were willful, deliberate and premeditated.

Ware waived a jury trial on the special allegations regarding his prior manslaughter conviction; and the trial court accepted Ware's admission from his first trial that he previously had been convicted of manslaughter. The trial court then sentenced Ware to state prison for two consecutive life sentences on the attempted murder counts with minimum parole eligibility terms of 14 years for each count (the seven-year minimum parole eligibility term doubled under the Three Strikes law), plus 20 years for each count for the firearm enhancement under section 12022.53, subdivision (c), plus five years pursuant to section 667, subdivision (a)(1). The trial court also imposed a sentence of 34 years for each assault count, composed of 14 years (the midterm of seven years doubled), plus 20 years for the firearm enhancement pursuant to section 12022.53, subdivision (c), but stayed execution of those two sentences pursuant to section 654. The court imposed a term of four years (the midterm of two years doubled) for possession of a firearm by a felon, the charge on which Ware had been found guilty after his first trial, but also stayed execution of that sentence pursuant to section 654.

CONTENTIONS

Ware contends (1) there is no substantial evidence to support the jury's finding that he was the person who shot at the police officers or, alternatively, if he was the shooter, that he acted with the intent to kill required for an attempted murder conviction; (2) the trial court abused its discretion by admitting evidence that at the time of the incident he was wanted by authorities in Louisiana for violating his parole on a prior manslaughter conviction and that a warrant for his arrest was outstanding in California based on his violation of his probation on a prior drug conviction; (3) he was denied the effective assistance of counsel because his defense counsel improperly managed the evidence regarding his prior manslaughter conviction and failed to object to the admission of portions of Gay's statement to the police; and (4) the trial court erroneously imposed sentences for the firearm enhancements as well as the attempted murder convictions.

DISCUSSION

1. *Substantial Evidence Supports Ware's Convictions*

a. *Standard of Review*

In reviewing a claim of insufficient evidence in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.) “In making this assessment the court looks to the whole record, not just the evidence favorable to the [defendant] to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.]” (*Holt*, at p. 667.)

“Substantial evidence” in this context means “evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 [“““ When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.”” [Citations.]”].) “Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt.” (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

b. *Ware's Identity as the Shooter*

The evidence, viewed in the light most favorable to the judgment, reasonably supports the jury's conclusion it was Ware who shot at Officers Kuns and Carroll. Both Officer Carroll and Patterson, eyewitnesses to the shooting, identified Ware in court as the shooter. Those in-court eyewitness identifications alone are sufficient to sustain Ware's conviction. (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497; see *People v. Scott* (1978) 21 Cal.3d 284, 296 [“uncorroborated testimony of a single witness is

sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable”].)

In addition to the eyewitness in-court identifications, Ware was linked to the Oldsmobile by his palm print on the passenger-side window of the car, providing “the strongest evidence of identity of a person” (*People v. Massey* (1961) 196 Cal.App.2d 230, 234; accord, *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39.) Moreover, Patterson’s statement that Ware’s hair was braided matched Smith’s testimony that, when she saw Ware after she had heard shooting outside the apartment complex, he was unbraiding his hair.

Contradictions or conflicts in the evidence, such as King’s testimony that Ware never drove the car, or inconsistencies between descriptions of the shooter and Ware’s appearance at the time the offenses were committed, do not require a different result. The jury was free to weigh the evidence and reject the testimony on which Ware relies to argue he was not the shooter.⁷ (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259 [“It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses”]; see also *People v. Lewis* (2001) 26 Cal.4th 334, 361 [““Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]””].)

Based on the eyewitness in-court identifications, the fingerprint analysis and other identifying evidence presented at trial, we cannot say that no rational trier of fact reasonably could have concluded Ware was the shooter. “Unless the evidence of identity is so weak as to constitute no evidence at all, this court cannot set aside the decision of

⁷ The jury was instructed properly under CALJIC No. 2.92 on how to evaluate the eyewitness testimony presented at trial.

the trial court. [Citations.]” (*People v. Shaheen* (1953) 120 Cal.App.2d 629, 637.) Such plainly is not the case here.

c. *Ware’s Intent to Kill the Officers*

Although intent to kill is an element of attempted murder (*People v. Carpenter* (1997) 15 Cal.4th 312, 391), whether a person possessed that intent is a question for the trier of fact (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945, fn. 4, 946), which can be proved by direct or circumstantial evidence (*People v. Belton* (1980) 105 Cal.App.3d 376, 380-381). Because direct evidence of intent to kill is rare, the requisite intent usually is proved by the circumstances of the attempt. (*Lashley*, at pp. 945-946.)

The circumstances of the attempt in this case -- during a high-speed pursuit, Ware stopped, got out of his car and fired multiple shots from a semiautomatic weapon at two armed police officers who were within striking distance -- constitute sufficient evidence that Ware possessed the intent to kill: “‘The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill” [Citation.]’” (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1225; see also *People v. Jackson* (1989) 49 Cal.3d 1170, 1201 [intent to kill could be inferred from act of firing shotgun at police officer a short distance away]; *People v. Lee* (1987) 43 Cal.3d 666, 679 [evidence of intent to kill compelling where a fleeing suspect stopped, turned, aimed and fired “‘at people he knew to be armed policemen”’ from distance of 15 to 20 feet]; *Villegas*, at pp. 1224-1225 [intent to kill could be inferred from evidence defendant fired six shots at an occupied truck from 25 feet away]; *People v. Lashley*, *supra*, 1 Cal.App.4th at p. 945 [intent to kill could be inferred from act of firing rifle at a boy 20 yards away “in a manner that could have inflicted a mortal wound had the bullet been on target”].) Ware’s poor marksmanship does not establish he had “a less culpable state of mind,” nor does his decision to stop shooting at the officers establish he “lacked the animus to kill in the first instance.” (*Lashley*, at p. 945.)

2. *The Trial Court Properly Admitted Evidence Ware Was Wanted by Authorities in Louisiana and a Warrant for His Arrest Had Issued in California*

a. *Evidence Relevant Under Evidence Code Section 1101*

Although evidence a defendant has committed crimes other than those currently charged is not admissible to prove the defendant's bad character or criminal disposition, such evidence is admissible when relevant to prove, among other facts, the defendant's motive or intent. (Evid. Code, § 1101⁸; *People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Barnett* (1998) 17 Cal.4th 1044, 1120.) A trial court's ruling that evidence is relevant and admissible pursuant to Evidence Code section 1101 is reviewed for an abuse of discretion. (*Kipp*, at p. 369; see also *People v. Lewis* (2001) 25 Cal.4th 610, 637.)⁹

Evidence that Ware was wanted for parole violations in Louisiana and had an outstanding arrest warrant in California for probation violations was relevant to establish his motive and intent to avoid contact with law enforcement to prevent a return to prison. (*People v. Daly* (1992) 8 Cal.App.4th 47, 55 ["The prosecution theory was [defendant] fired on police at the motel in order to avoid going back to prison for the robberies and the kidnapping for which he knew he was under investigation. Thus, the evidence of the robberies would be relevant to show motive and intent at the time of the attempted murder"]; *People v. Powell* (1974) 40 Cal.App.3d 107, 154-155 [where defendant on trial for killing a police officer who pulled him over for failing to have an illuminated rear

⁸ Evidence Code section 1101, subdivision (a), provides, "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (b) provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

⁹ An abuse of discretion will not be found unless the trial court has exceeded the bounds of reason by exercising its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

license plate, evidence defendant had been convicted of a felony and released on parole properly admitted on the issue of intent to kill to avoid revocation of parole and return to prison]; see also *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1020, fn. 2 [“Service of a prison term is highly probative to show a motive to flee apprehension for the current crime, i.e., to avoid service of additional future prison term”]; *People v. Combes* (1961) 56 Cal.2d 135, 147-148 [“where the victims of murders were police officers who had stopped the defendants for investigation or to arrest them, evidence that the defendants had previously committed serious crimes has always been held properly admitted to prove that the motive for the killing was to prevent arrest and punishment for the crimes they had committed”].)¹⁰

b. *Evidence Admissible Under Evidence Code Section 352*

Even if evidence of uncharged crimes is relevant under Evidence Code section 1101, before admitting the evidence a trial court must also find its probative value is not substantially outweighed by its potential for undue prejudice under Evidence Code section 352.¹¹ (*People v. Kipp, supra*, 18 Cal.4th at pp. 369-370.) A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 402.) “Undue prejudice” refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis:

¹⁰ *People v. Hamilton* (1985) 41 Cal.3d 408, vacated and remanded on instructional grounds in *California v. Hamilton* (1986) 478 U.S. 1017 [106 S.Ct. 3328, 92 L.Ed.2d 734], on which Ware relies, is inapposite. In *Hamilton* the California Supreme Court held evidence of the defendant’s fear of prison was inadmissible to suggest he killed his burglary victim to prevent a return to prison because such a chain of inferences was “tenuous.” (41 Cal.3d at p. 426.) Nothing in *Hamilton* suggests prior crimes evidence is not admissible to prove motive and intent in a case such as this where a defendant, subject to arrest and return to prison, flees from pursuing officers.

¹¹ Evidence Code section 352 provides, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

“The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. ‘[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.” The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues’” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) A trial court’s determination pursuant to Evidence Code section 352 likewise is reviewed for an abuse of discretion. (*People v. Barnett, supra*, 17 Cal.4th at p. 1118.)

The trial court, after conducting the balancing analysis required by Evidence Code section 352, did not abuse its discretion by finding the probative value of the prior crimes evidence justified its admission in this case. Because the People were required to prove Ware had an intent to kill, an explanation for his motive in attempting to evade the officers was highly relevant to the case and not provable by other evidence. (*People v. Durham* (1969) 70 Cal.2d 171, 188 [where defendants shot and killed officer during routine automobile stop, “ample authority [exists] for the admission of evidence of prior criminal activity when such evidence provides considerable circumstantial proof of the actor’s mental state at the time of the charged offense”]; *People v. Powell, supra*, 40 Cal.App.3d at p. 155 [upholding trial court’s discretion in balancing under Evid. Code, § 352 when evidence of parole status “could reasonably tend to prove [defendant] killed [a police officer] to avoid revocation of his parole and return to prison”]; see *People v. Alcala* (1984) 36 Cal.3d 604, 635 [prior crimes evidence properly admitted when “motive of escape is central” to case and “can be shown in no other way,” but not when it is speculative on the issue of motive and cumulative].)

In addition, the trial court guarded against the possibility of undue prejudice by instructing the jury both immediately after the evidence was introduced and before deliberations that it could consider the evidence of other crimes and parole and probation

violations solely on the issues of motive and intent.¹² The jury is presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)¹³

3. *Ware Was Not Deprived of the Effective Assistance of Counsel*

Ware contends his trial counsel rendered ineffective assistance by (1) failing to move to exclude evidence that the prior conviction for which he was on parole was for manslaughter; (2) failing to request the jury be informed that he was a juvenile when the manslaughter offense was committed and had spent several years in prison pending the outcome of the case; (3) stipulating to incorrect dates for his manslaughter conviction and release on parole; and (4) failing to object to the admission of Anita Gay's statement to police on the ground it contained inadmissible hearsay that was not inconsistent with or did not impeach her prior trial testimony. We disagree.

A defendant claiming ineffective assistance of counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under

¹² Before deliberations, the trial court instructed the jury under CALJIC No. 2.50, "Evidence has been introduced by stipulation of counsel for the purpose of showing that the defendant committed crimes other than those for which he is now on trial, and that he failed to report to the parole supervision or probation supervision resulting in the issuance of arrest warrants. Except as you may otherwise be instructed, this evidence may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show, number one, the existence of the intent or mental state, which is a necessary element of the crimes charged, and/or two, a motive for commission of the crimes charged. For the limit[ed] purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in this case."

¹³ Given the precautions taken by the trial court and the strength of the evidence against Ware, it is not likely the jury would have returned a verdict more favorable to Ware absent admission of the prior crimes evidence. Thus, even if the trial court had erred in admitting the prior crimes evidence, that error would not constitute a basis for reversal of the judgment. (See *People v. Malone* (1988) 47 Cal.3d 1, 22 [applying *People v. Watson* (1956) 46 Cal.2d 818 standard of reversal to admission of prior crimes evidence; reversal warranted only if it is reasonably probable defendant would have obtained a better result had the evidence been excluded].)

prevailing professional norms but also that it is reasonably probable that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 ["To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.]"].)

As to defense counsel's failure to object to the introduction of evidence that Ware's prior conviction was for manslaughter, "rarely will the failure to object establish incompetence of counsel, because the decision whether to raise an objection is inherently tactical." (*People v. Lewis* (2001) 25 Cal.4th 610, 678; see also *People v. Maury* (2003) 30 Cal.4th 342, 415-416 ["Whether to object to arguably inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference, failure to object seldom establishes counsel's incompetence"].) Moreover, in a case such as this "[w]here counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions. [Citations.]" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Defense counsel's decision not to object to this evidence reasonably could have been based on the concern that, without being told the nature of the crime, the jury might have speculated it was more serious than it actually was, for example, murder or attempted murder. Indeed, in closing argument defense counsel attempted to minimize the significance of the prior conviction for manslaughter by arguing, "You don't know what the manslaughter was all about, whether he ran over somebody with a truck or that they couldn't prove a case against him and he took a deal. You don't know what that is about, so you leave it alone." Thus, a tactical reason exists for defense counsel's decision

to allow the jury to hear the prior conviction was for manslaughter. Moreover, given the strength of the evidence against Ware and his counsel's use of the evidence, it is not reasonably probable he would have obtained a better result had the evidence not been admitted.

Ware's contention his defense counsel should have sought to admit evidence that he was a juvenile at the time of the manslaughter offense and had spent several years in prison before the case was resolved is equally unavailing. Although Ware suggests those facts would have made him appear more sympathetic to the jury, his defense counsel reasonably could have concluded that knowledge Ware had killed someone as a juvenile and spent years in prison for the offense, not long before the instant offenses were committed, might have done more harm than good. Defense counsel plainly was not ineffective in this regard, given the tactical basis for his decision and the possibility Ware actually would have suffered prejudice by the admission of the evidence.

As to Ware's claim regarding the date of his manslaughter conviction, he appears correct that the stipulation identifies the conviction date as January 24, 2000 while documents in the record (but not before the jury) indicate it was October 14, 1999. Nevertheless, learning the conviction had occurred approximately three months earlier would not likely have caused the jury to render a verdict more favorable to Ware.¹⁴ (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003.)

Finally, Ware's claim his counsel was ineffective for failing to object on hearsay grounds to the introduction of portions of Gay's statement to the police that were not inconsistent with her testimony from the first trial also fails. The portion of Gay's statement about which Ware now complains could have bolstered her testimony that, although she saw Patterson in the Oldsmobile as it passed through the gas station, she did not see Ware driving the car. Although Ware argues on appeal that Gay's statement

¹⁴ Although Ware also argues the stipulation incorrectly represented the date he was paroled in Louisiana for the manslaughter conviction, he cites nothing in the record to demonstrate he was released on parole on a different date.

enhanced Patterson's credibility, defense counsel reasonably could have concluded the statement was nevertheless beneficial to the defense because it indicated that, had Gay seen Ware in the car, she would have identified him to the officers. Given this tactical decision and the potential benefit to Ware's case from the contents of Gay's statement, Ware cannot prove either that his counsel was ineffective or that he suffered any prejudice as a result. (*People v. Maury*, *supra*, 30 Cal.4th at pp. 415-416; *People v. Weaver*, *supra*, 26 Cal.4th at pp. 925-926; *People v. Lewis*, *supra*, 25 Cal.4th at p. 678.)

4. *The Trial Court Properly Sentenced Ware for Both the Attempted Murder Offenses and the Firearm Enhancements*

The trial court sentenced Ware to a life term for each attempted murder offense and an additional 20 years for each count based on the jury's true findings on the section 12022.53, subdivision (c) enhancements for personal and intentional discharge of a firearm. Ware contends that, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*), imposing separate punishments for attempted murder and for personally and intentionally discharging a firearm while committing the attempted murder violates principles of double jeopardy, collateral estoppel, double punishment, due process and the *Ireland* merger doctrine.¹⁵

Apprendi addresses the constitutional right to trial by jury, not principles of double jeopardy, collateral estoppel, double punishment, due process or merger in relation to the question whether a defendant may be subjected to additional punishment based on the manner in which he or she commits the underlying offense. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1212 [identifying *Apprendi* as a "right to jury trial" case]; see also

¹⁵ In *People v. Ireland* (1969) 70 Cal.2d 522, the Supreme Court held a conviction for felony murder may not be based on a felonious assault that is an integral part of the homicide. A contrary rule, the Court explained, would eliminate the element of malice from the crime of murder in any case in which the homicide resulted from the felonious assault. (*Id.* at p. 539.) The so-called *Ireland* merger doctrine has not been applied outside the context of felony-murder cases involving assault (*People v. Hansen* (1994) 9 Cal.4th 300, 311; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1012, 1014, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896) and simply has no bearing on the sentence imposed on Ware in this case.

People v. Smith (2003) 110 Cal.App.4th 1072, 1075 [*Apprendi* “concern[s] the appropriate allocation of fact-finding responsibilities between judge and jury”].) “This is what *Apprendi* teaches us: Except for sentence enhancement provisions that are based on a defendant’s prior conviction, the federal Constitution requires a jury to find, beyond a reasonable doubt, the existence of every element of a sentence enhancement that increases the penalty for a crime beyond the ‘prescribed statutory maximum’ punishment for that crime. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

In this case, in compliance with *Apprendi*, the jury found beyond a reasonable doubt that Ware personally and intentionally discharged a firearm in committing the attempted murder offenses. Those findings properly enhanced Ware’s sentence by 20 years for each count of attempted murder. Because the sentence enhancement for personal and intentional discharge of a firearm is not an independent substantive offense or crime (*People v. Bright* (1996) 12 Cal.4th 652, 661), Ware’s punishment for both the enhancements and underlying crimes does not violate principles of double jeopardy, collateral estoppel, double punishment, due process or merger.

Ware additionally argues that section 654 prevents imposition of the firearm enhancements because the attempted murders and shooting of the firearm stem from the same act.¹⁶ Section 654, however, does not apply to statutory enhancements such as section 12022.53, subdivision (c), for the personal and intentional discharge of a firearm. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313 [imposition of § 12022.53, subd. (d), firearm enhancement in addition to a term for second degree murder does not violate § 654]; *People v. Myers* (1997) 59 Cal.App.4th 1523, 1529-1534 [enhancement for discharging a firearm from a moving vehicle not double punishment under § 654 because it is separate from the underlying murder offense]; *People v. Ross* (1994) 28

¹⁶ Section 654, subdivision (a), provides, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

Cal.App.4th 1151, 1157-1159 [proper to punish defendant for voluntary manslaughter and firearm use enhancement because “the gun was simply the method selected by [defendant] to accomplish the crime, and the particular method selected subjects [him] to additional penalty”].) By sentencing a defendant for both a firearm enhancement and the term for the underlying offense, “the law is not punishing [the defendant] twice for the same act; rather, the law is punishing him once each for the components of that act which make it so dangerous and antisocial.” (*Hutchins*, at p. 1315.)

The Legislature specifically directed that section 12022.53 enhancements are mandatory and may not be stayed. (§ 12022.53, subd. (c) [enhancement “shall” be imposed]; subd. (g) [preventing probation or suspension of sentence for any person found to come within § 12022.53]; subd. (h) [preventing court from striking a § 12022.53 allegation or finding].) “Clearly in enacting [section 12022.53] the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes . . . was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature’s intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties.” (*People v. Hutchins*, *supra*, 90 Cal.App.4th at p. 1313.) Thus, the trial court properly punished Ware for both the underlying attempted murder offenses and the mandatory firearm enhancements.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

JOHNSON, J.

WOODS, J.